

## CREDITOR CLAIMS IN DECEDENT'S ESTATES

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### **CREDITOR CLAIMS IN DECEDENT'S ESTATES**

## **VII. Introduction**

### **1. Opening Comments**

The Texas Probate Code sections appertaining to creditor claims are often the most confusing and misunderstood statutes in the probate process. The non-probate practitioner and jurist alike are confronted with a maze of statutes that appear to have no rational organization or specific applicability to an independent or dependent administration. Hence, a clear understanding of the creditor claims process is imperative if we are to assist our clients through this legal labyrinth.

### **2. Two Sets Of Rules**

The Texas Legislature made extensive amendments to the creditor claims statutes in 1995. The result of these changes now require you to recognize that there are two (2) sets of rules relevant to creditor claims. The *old rules* are represented by code sections in effect for decedents dying *prior* to January 1, 1996. The *new rules* apply to decedent's dying *after* January 1, 1996.

## **20. Statutory Notice Requirements**

### **1. Notice to Creditors Before 1996 Independent and Dependent Estates**

The United States Supreme Court declared in Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988) that actual notice by mail or other means to known or reasonably ascertained creditors is necessary. The Texas Legislature responded with the 1991 and 1993 amendments to T.P.C. §295.

#### **1-1. Secured Creditor Notification**

The old rules require the executor or administrator to give *actual notice* by certified or registered mail to all known or reasonably ascertainable creditors within four (4) months after receiving letters.

#### **2-1. Unsecured Creditor Notification**

The actual notice by mail requirement is in addition to published notice to creditors, in a newspaper, within one (1) month after receiving letters pursuant to T.P.C. §294. See Gilbert v. Jennings, 890 S.W.2d 116 (Tex.

App.—Texarkana 1994, writ denied) holding that the publisher's affidavit, filed in the probate court one day before a summary judgment hearing, but not attached to the motion, was adequate summary judgment evidence because it was a public record.

### **3 . Notice to Creditors Effective January 1, 1996 Independent And Dependent Estates**

#### **1. Secured Creditor Notification**

T.P.C. §295 now provides that, within two months after receiving letters, the personal representative shall give notice to anyone actually known to the personal representative to have a claim against the estate which is secured by either real or personal property of the estate.

- 1) T.P.C. §295 also provides that, the personal representative shall also give notice to that person within a reasonable time after the personal representative obtains actual knowledge of a secured claim by anyone to whom notice had not been previously given.
- 2) T.P.C. §295(b) requires notice by certified or registered mail, return receipt requested, addressed to the record holder of the indebtedness at the holder's last known address.
- 3) T.P.C. §295(c) requires a copy of the notice, with return receipt and an affidavit of the representative stating that the notice was mailed as required by law, to be filed with the clerk.

#### **20. Unsecured Creditor Notification**

T.P.C. §294(a) requires published notice to all persons having claims against the estate.

- 1) T.P.C. §294 now contains no absolute requirement that actual notice be given to unsecured creditors.
- 2) However, §294(d) permits a personal representative to give notice by certified mail to an unsecured creditor, stating that the creditor must present his claim within four (4) months after the date of the receipt of the notice *or the claim is barred*.
- 3) T.P.C. §146(a)(1) requires an independent executor to provide notice pursuant to §§294-295 and now §146(a)(2) provides that the independent executor may give the permissive notice which is allowed under §294(d) and bar a claim under that subsection.

### **3-1. Comptroller of Public Accounts Notice**

The executor or administrator must give notice of his appointment by certified or registered mail to the comptroller of public accounts within *one month* of receiving letters if the decedent remitted or should have remitted taxes administered by that office.

### **4-1. One Notice Sufficient**

A successor or co-executor/administrator need not give notices pursuant to §294-295 if previously done. T.P.C. §296.

### **5-1. Penalty For Failure To Give Notice**

The administrator and the sureties of his bond shall be liable for damages suffered from any neglect to give notice, i.e. a surcharge action.

- 1) The representatives and sureties on the representative's bond shall be personally liable for damages suffered from any neglect to give notice. T.P.C. §297

## **30. Creditors Claim Presentment**

### **1. Dependent Administration**

## 1. Two Methods of Presentment

### 1) Direct Presentment

The creditor may present the claim directly to the personal representative, pursuant to 298(a); See Cochran's Administrator's v. Thompson, 18 Tex. 652 (1857) and Ex parte Buller, 834 S.W.2d 622 (Tex. App.—Beaumont 1992, no writ) (holding that a personal representative has a fiduciary relationship to creditors); or

### 2) Presentment To Clerk

Claims may be presented by depositing them with the clerk. The clerk will notify the administrator of the claim(s) deposit. A failure by the clerk to give notice does not affect the validity of the presentment or the presumption of rejection if the claim is not acted upon within thirty (30) days after it is filed. T.P.C. §308

## 2-1. Exceptions To Presentment

There are a few exceptions to the “presentment” requirement in a dependent administration. See Carter v. Kahler, 902 S.W.2d 85 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1995, writ denied) and Donaldson v. Taylor, 713 S.W.2d 716 (Tex. App.—Beaumont 1986, no writ) (discussing when no presentment required.)

### 1) Unliquidated Claim

An “unliquidated” claim need not be presented because T.P.C. §298 requires that only “all claims *for money*” be presented to the administrator. Case law has construed this term as not requiring that a claim be presented if the amount thereof cannot be ascertained with reasonable certainty. Examples of such unliquidated claims are tort claims. See Wilder v. Mossler, 583 S.W.2d 664 (Tex. Civ. App.—Houston 1979, no writ); and quantum meruit claims for services rendered Wells v. Hobbs, 122 S.W. 451 (Tex. Civ. App.—1909, no writ); Moore v. Rice, 80 S.W.2d 451 (Tex. Civ. App.—Eastland 1935, writ dism'd w.o.j).

### 2) Specific Performance



Presentment is not a prerequisite to a suit for specific performance. See Bullion v. Campbell & Strong, 27 Tex. 653 [1864]; Robinson v. McDonald's Widow & Heirs, 11 Tex. 385 [1854].

3) Contract Rescission

Lusk v. Mintz, 625 S.W.2d 774 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1981, no writ). An action for possession and title to property due to an express vendor's lien is not a claim for money requiring assertion through the probate courts. See, Walton v. First Nat'l. Bank of Trenton, 956 S.W. 2d 647 (Tex. App.—Texarkana 1997, pet. denied) holding that claims...for title to or possession of property need not be presented to an administrator before filing a suit on the claim.

4) Administrator's Claim

Presentment is not required where the administrator has a claim against the decedent, but it must be filed with the court within six (6) months after the personal representative is qualified. T.P.C. §317(a)

5) Beneficiaries Claim

T.P.C. §317 (c) eliminates presentment as a requirement with respect to “the claim of any heir, devisee or legatee who claims in such capacity, or to any claim that accrued against the estate after the granting of letters for which the representative of the estate has contracted.” See Ullrich v. Anderson, 740 S.W.2d 481 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, no writ) (holding that a claim for accounting fees pursuant to a contract with an administrator was not required to be presented to the administrator and could therefore be acted upon by the court in the first instance.)

6) Preferred Debt and Lien

Arguably, a preferred debt and lien claim pursuant to T.P.C. §306 (a)(2) does not have to be formally presented because it does not conform to the classification statute. However, §306 contemplates its presentment and the practitioner is well advised to present same. See, Rivera v. Morales, 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (holding that an executory sales contract for the purchase of real estate could not be canceled by the seller without first filing a claim in a dependent administration.) The court likened the contract of

sale to a mortgage and stated: “we fail to see how one can be considered a ‘money claim’ and not the other.”

## 2. **Independent Administration**

### 1. **Limited Court Involvement**

The independent administration of an estate involves limited court involvement. See Cunningham v. Parkdale Bank, 660 S.W.2d 810 (Tex. 1983).

#### **3-1. No Formal Presentment Required**

A creditor does not have to strictly follow the dependent administration procedures for claim authentication and payment. See T.P.C. § 146 and Geary v. Texas Commerce Bank, 967 S.W.2d 836 (Tex. 1998) (footnoting the conflicting views regarding the applicability of T.P.C. § 306 to an independent administration.)

##### 1) Required Actions

The independent executor must approve, classify and pay, or reject, claims against the estate in the same order of priority, i.e. §§320,321; classification, §322; and, proration, §321, prescribed by the Probate Code. T.P.C. §146 (a)(3). The independent executor must give notice to the Comptroller of Accounts; to persons having claims against the estate; and, may give notice to unsecured creditors having a claim for money pursuant to T.P.C. § 294. Mandatory notice must be given to persons having a claim for money that is secured by real or personal property of the estate pursuant to T.P.C. § 295.

##### 2) Creditor's Notice of Election

A creditor's claim for money which is *secured* by the estate's real or personal property must notify the executor by certified or registered mail of his election to have the claim approved as a secured claim to be paid in the due course of administration. T.P.C. §§ 295, 146(b), 306. See, Geary v. Texas Commerce Bank, 967 S.W.2d 836 (Tex. 1998) footnoting the conflicting views regarding the applicability of T.P.C. § 306 to an independent administration.

##### 3) Election Notification Period

A creditor must notify the executor of his election within six (6) months after the grant of letters or within four (4) months after the date of notice is received by the creditor pursuant to T.P.C. §295. See, T.P.C. §§ 146(b), 306 and Geary v. Texas Commerce Bank, supra.

4) Failure to Elect Consequences

The claim will be treated as a preferred debt and lien against the specific property securing the indebtedness and shall be paid according to the contract terms securing the lien when the creditor fails to otherwise make an election. T.P.C. §§ 146, 295. See Texas Commerce Bank N.A. v. Geary, 938 S.W.2d 205. In either a dependent or independent administration a deficiency judgment after foreclosure is precluded.

5) Early Claim Payment

The independent executor may pay the secured claim before it matures if it is in estate's best interest. T.P.C. §146(b)

6) Creditor's Acceptance of Proceeds

The secured creditor elects preferred debt and lien status when he accepts the proceeds from the sale of the secured asset. See Gross National Bank of San Antonio v. Merchant, 459 S.W. 2d 483 (Tex. App.—San Antonio 1970, no writ).

7) Estate Contract

A creditor who was retained by an executor or administrator to perform estate services may present his claim for payment directly to the court pursuant to T.P.C. §§242 and 317. See Ullrich v. Estate of Anderson, 740 S.W.2d 481 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1987, no writ).

8) Tort Claims

Tort claims including personal injury actions. Allen V. Denk, 87 S.W.2d 303 (Tex. Civ. App. Austin 1935, no writ); McPherson v. Judge, 592 S.W.2d 406 (Tex. Civ. App.—Amarillo 1979, no writ); and Wilder v. Mossler, 583 S.W.2d 664 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1979, no writ).

9) Land Contracts

- Specific performance of contracts for conveyance of land. Bullion v. Campbell & Strong, 27 Tex. 653 (1864).
- 10) Breach of Contract
- Action based on breach of contract to convey land. Moore v. Rice, 80 S.W.2d 451 (Tex. Civ. App.—Eastland 1935, writ dismissed).
- 11) Unpaid Child Support
- Claims for unpaid child support which the court regards as debt which must first be reduced to judgment under the Texas Family Code. Adair v. Martin, 595 S.W.2d 513 (Tex. 1980); Martin v. Adair 601 S.W.2d 543 (Tex. Civ. App.—Beaumont 1980, no writ).
- 12) Claims of U.S.
- Claims of the United States are not subject to state law requirements. U.S. v. Backus, 24 F. Cas 932 (No. 14,491) (C.C.D. Mich. 1855); U.S. v. Oklahoma, 261 U.S. 253, 43 S. Ct. 295, 67 L.Ed. 638 (1923).
- 13) Claims for Title
- Claims for title to or possession of real property need not be presented to the representative and rejected as a prerequisite to filing of a suit against the estate or before it can be enforced. Lusk v. Mintz, 625 S.W.2d 774 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1981, no writ).

#### **40. No Ninety-Day Suit Requirement**

The ninety-day requirement to institute suit on a rejected claim does not apply in an independent administration. A claim is not barred after ninety days if rejected and suit is not filed. See, T.P.C. § 147, Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968); and National Guaranty Loan & Trust Co. v. Fly, 69 S.W. 231 (Tex. Civ. App. 1902, no writ).

A judgment creditor may execute any subsequent judgment against the estate's assets. See, T.P.C. § 147.

#### **2. Executor's Liability**

An independent executor may pay at any time and without personal liability, a claim to the extent approved and classified if:

- 1() the claim is not barred; and

- 2() he reasonably believes the estate will have sufficient assets to pay all claims against the estate at the time of payment. T.P.C. §146(c)(1)(2). See Rowland v. Moore, 174 S.W.2d 248 (Tex. 1943) (representing that an executor has full powers to resolve creditor claims.)

### 3. **Enforcement of Claims by Suit**

A creditor may enforce the payment of his claim against an independent executor by suit. This section, in effect, is a recognition of the long established rule that formal presentation of claims is unnecessary in an independent administration. T.P.C. §147

- 2) T.P.C. §147 also provides that an independent executor is not required to file an answer until six (6) months have elapsed from the date that an independent administration is created and the order appointing the independent executor is entered.

### 5-1. **Requiring Heirs To Give Bond**

A creditor may petition the court to require all distributees, heirs and others entitled to any portion of the estate to execute a bond for an amount equal to the claim or the estate's full value, whichever is smaller. T.P.C. §148. See. See Kaufman v. Wooters, 13 S. W. 549 (Tex.1890) (evidencing heirs are rarely required to give bond.)

### 3. **Claims By Personal Representative**

A personal representative holding a claim against an estate must file a verified claim to the court granting the letters within *six months* after qualifying or the claim is barred. T.P.C. §317.

## 40. **Claim Review Procedure**

### 1. **Dependent Administration**

#### 1. **Administrator's Review**

The administrator must review a claim presented to the court or himself within thirty (30) days there from and either reject or allow same, in whole or in part. T.P.C. §309. See Russell v. Dobbs, 354 S.W.2d 373 (Tex. 1962)

(holding administrator may reject claim at any time without notice to claimant.)

### **1-1. Supporting Affidavit**

Neither the administrator nor the court can approve a money claim unless it is supported by an affidavit stating that the claim is just and that all offsets, payments and credits known to the affiant have been allowed. T.P.C. §301

- 1) An unexecuted affidavit renders it insufficient and improperly presented. See Anderson v. Oden, 780 S.W.2d 463 (Tex. App.—Texarkana 1989, no writ) holding that the authentication process protects estate against unjust demands and reduces litigation costs associated with claims which should be paid.

### **2-1. Corporate Affidavit**

Any authorized corporate officer or representative may execute the affidavit required to authenticate a corporate claim. The authorized officer should state that a diligent inquiry and examination was made and the claim is just with all legal offsets, payments and credits thereon having been made. T.P.C. §304. See Small v. Small, 434 S.W.2d 940 (Tex. Civ. App. Waco, 1968, writ ref'd n.r.e.) (regarding failure to attach a supporting affidavit); Furniture Dynamics v. Estate of Hurley, 560 S.W. 2d 486 (Tex. Civ. App. Dallas 1977, no writ) (allowing creditor to file amended claim within statute of limitations period and the earlier claim rejection did not trigger the ninety day suit requirements of T.P.C. §313); and, Boney v. Harris, 557 S.W.2d 376 (Tex. Civ. App. Houston [1<sup>st</sup> Dist.] 1977, no writ) (holding that the ninety (90) day limitations period could not run against a void claim.)

### **3-1. Objections To Claim Form**

An administrator is deemed to have waived any defect of form or claim of insufficiency of exhibits or vouchers presented unless he files written objections thereto within thirty (30) days of presentment and files them with the county clerk. T.P.C. §302

- 1) Form vs. Substance

The court in City of Austin v. Aguilar, 607 S.W.2d 310 (Tex. Civ. App.—Austin 1980, no writ) concluded that when an administratrix failed to object in writing that the claims were not authenticated by the city manager the defect was of *form* and waived, hence, rendering the claim valid.

The court in Boney v. Harris, 557 S.W.2d 376 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1977, no writ) concludes that an affidavit lacking the statement that all legal offsets, payments and credits were allowed was *substantially* void.

2) Right of offset

A creditor bank has a right of offset against a decedent's funds on deposit without having to file a claim in probate. See Bandy v. First State Bank of Overton, 835 S.W.2d 609 (Tex. 1992).

#### **4-1. Failure To Approve or Reject Claim**

A claim is deemed rejected if the administrator neither approves nor rejects it within thirty (30) days of presentment. T.P.C. §310. See Russell v. Dobbs, 354 S.W.2d 373 (Tex. 1962) reviewing rule that creditor need not be notified of claim rejection.

#### **5-1. Claim Rejection**

The creditor must institute suit on a rejected claim, in whole or in part, within ninety (90) days of its rejection or the claim is forever barred. T.P.C. §313. See Bailey v. Cherokee County Appraisal Dist., 862 S.W.2d 581 (Tex. 1993); and Howe State Bank v. Crookham, 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ) holding that suit be brought in court where administration is pending.

1) Partial Rejection

A creditor must file suit for the full claim rather than the rejected portion within ninety (90) days from the date of partial rejection.

See Klutts v. Newbury, 453 S.W.2d 243 (Tex. Civ. App.—Fort Worth 1970, no writ).

2) Claimant's Judgment

A claimant's judgment on a rejected claim will not allow any execution thereon, rather, the judgment shall be entered upon the claim docket, be classified and paid in the due course of administration. T.P.C. §313. See Long v. Castaneda, 475 S.W.2d 578 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.)

3) Subsequent Rejection

An administrator may not subsequently reject a claim previously allowed even if the court has not acted upon the

claim. See Hensel v. International Bldg. and Loan Ass'n., 85 Tex. 215, 20 S. W. 116 (1892).

### **6-1. Claim Docketing**

The administrator must file the allowed or rejected claim, in whole or in part, with the county clerk who will thereafter file the same on the claim docket. T.P.C. §311

The claimant should ascertain that this procedure is followed regarding his approved claim and request the clerk to notify claimant of the filing pursuant to T.P.C. §33 (j).

### **2. Objection To Claim**

Any interested person may object in writing to any claim, in whole or in part, before the court acts upon it. T.P.C. §312(a).

- 1() The objecting party is entitled to a hearing, which includes witnesses and proof as in ordinary suits. T.P.C. §312(a)

### **3. Independent Administration**

#### **1. Inapplicable Statutes**

The requirements of T.P.C. §301 (authentication of claim), §302 (waived defects), §304 (third party authentication) and §308 (depositing claim with clerk) are not applicable to an independent administration. See Fischer v. Britton, 83 S.W.2d 305 (Tex. 1935) and Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968).

- 1) The requirement of T.P.C. §309 (memorandum of allowance or rejection), §310 (failure to endorse memorandum) and §313 (suit on rejected claim) are not applicable to an independent administration. See Bunting v. Pearson, supra.

#### **2. Limitations**



T.P.C. §298(b) uses the words “personal representative” in stating that claims barred by limitations cannot be allowed.

- 2) Whether §298(b) applies to an independent executor is an open question.
- 3) It would seem, however, that even though the court would not be in a position to disallow a claim barred by limitations under these circumstances, a person interested in the estate would have the right to complain by a separate suit against the executor (and possibly the creditor whose claim would otherwise be barred), if the executor paid a claim upon which limitations had run. Otherwise, the beneficiaries and other creditors would be penalized by the arbitrary action of the independent executor if a claim barred by limitations were paid.
- 4) Likewise, no authority has been found on the question of whether §16.062 of the Texas Civil Practice and Remedies Code applies in an independent administration, although that section expressly mentions “an executor” as well as an “administrator”.
- 5) The tolling of an applicable statute of limitations for the twelve (12) months following a decedent’s death and/or limitations beginning to run upon qualification of an executor or administrator appears to be applicable to both independent and dependent administrations. C.P.R.C. §16.062 (a)(b).

## **50. Classification**

### **1. Independent Administration**

Texas courts have held that the statutory procedures for presenting claims do not apply to independent administrations. Bunting v. Pearson, 430 S.W.2d

470 (Tex. 1968); Collins v. State, 506 S.W.2d 293 (Tex. Civ. App.—San Antonio 1973, no writ).

### **1-1. Executor's Required Actions**

An executor must comply with T.P.C. §146 to the extent that although he is free from court control he:

“shall nevertheless, independently of and without application to, to any action in or by the court, approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification and proration prescribed in the Code...”

## **3. Dependent Administration**

### **2. Court Ruling**

The court shall classify all claims entered upon the claims docket after their respective ten (10) day posting period has expired. T.P.C. §312(b)

#### **1) Payment Priority**

The *court*, not the administrator, shall classify the claim and determine its priority of payment pursuant to T.P.C. §322, to wit:

Class 1      Funeral Expenses and expenses of last illness not to exceed 15,000.00...

Class 2      Expenses of administration...

Class 3      Secured money claims to be paid in the due course of administration...

Class 4      Child support judgment...

Class 5      Claims for taxes...

Class 6      Claims for the cost of confinement...

Class 7      Claims for medical reimbursement...

Class 8      All other claims

#### **2) The Court's Order**

The court's order shall have the force and effect of a final judgment and shall state, i.e:

- 1() The exact action it took upon the claim,
- 2() Whether it approved or disapproved the claim,
- 3() whether it approved or rejected the claim in part, and
- (4) The classification it assigned the claim. T.P.C. §312(d). See Furniture Dynamics v. Estate of Hurley, 560 S.W.2d 486 (Tex. Civ. App.—Dallas 1977, no writ).

3) Severance and Appeal

The claimant may directly appeal the court's ruling. T.P.C. §312(e).

**2-1. Claim Payment**

The administrator will not satisfy a claim for money in the due course of administration until the claim is approved by the court or established by judgment. T.P.C. §319

**3-1. Order of Payment**

The administrator should pay approved claims pursuant to T.P.C. §320(a), i.e.

- 1) Funeral and last illness expenses not to exceed \$15,000.00;
- 2) Allowances made to the surviving spouse and children;

- 3) Expenses of administration, preservation, safekeeping and management; and
- 4) Other claims in their order of classification.

#### **4-1. Order to Pay**

The creditor may obtain an order to pay an approved claim or an order to sell property or borrow money in order to pay the claim. T.P.C. §§326, 328, 329. Administration expenses directly related to preserving, maintaining and selling property subject to a preferred lien may, as a rule, be charged against it and be paid first out of the sale proceeds. T.P.C. §306. See San Antonio Savings Ass'n v. Beaudry, 769 S.W.2d 277 (Tex. App.—Dallas 1989, writ denied).

#### **5-1. Abatement of Bequests**

The abatement of bequests becomes necessary when there are insufficient assets to pay all debts and satisfy all bequests. Excepting payment of certain secured preferred debt and lien claims, estate taxes or a contrary intent expressed in a will, the decedent's property is abated by a plan set out under T.P.C. §322B in the following order: (1) property not disposed of by will but passing by intestacy; (2) personal property of the residuary estate; (3) real property of the residuary estate; (4) general bequests of personal property; (5) general devises of real property; (6) specific bequests of personal property; and (7) specific devises of real property.

#### **6-1. Deficiency of Assets**

The administrator or executor should satisfy claims of the same class on a *pro-rata* basis when there are insufficient assets. T.P.C. §321. See Woods v. Bradford, 284 S.W. 673 (Tex. Civ. App. \_El Paso 1926, no writ), Jenkins v. First Nat'l Bank of Coleman, 101 S.W.2d 845 (Tex. Civ. App.—Austin 1937, no writ), and Ertel v. O'Brien, 852 S.W.2d 17 (Tex. App—Waco 1993, writ denied).

#### **7-1. Failure to Pay Claim**

The administration and the sureties on his bond may be liable for the non-payment of the claim, interest, costs and statutory damages of five percent

(5%) per month thereon. T.P.C. §328(b) See Fillion v. Osborne, 585 S.W.2d 842 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1979, no writ).

## **8-1. Debts Due to the United States**

There are other debts and expenses which must be taken into account by the personal representative before the representative can pay any of the claims which are classified under T.P.C. §322.

- 1) The Probate Code does not mention any amounts which may be owing to the United States government. Under 31 U.S.C.A. §3713(a), “a claim of the United States Government” must be paid before other claims against the estate. Section 3713 (a) provides as follows:

A claim of the United States Government shall be paid first when - a person indebted to the Government is insolvent and the debtor is without enough property to pay all debts makes a voluntary assignment of property; or property of the debtor, if absent, is attached; or an act of bankruptcy is committed; or estate of a deceased debtor, in the custody of the executor or the administrator, is not enough to pay all debts of the debtor.

- 2) What happens if the personal representative ignores 31 U.S.C.A. §3713(a) and does not give priority to claims of the United States? If the estate is insolvent, the personal representative is *personally liable* to the United States. This is clear under 31 U.S.C.A. §3713(b):

A representative of a person or an estate (except a trustee acting under Title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

## **60. The Secured Creditor**

### **1. Dependent Administration**

#### **1. Deed of Trust Foreclosure**

The creditor whose debt is secured by a mortgage, lien, or other security device is estopped from pursuing the usual collection remedies.

1) Power of Sale Under Deed of Trust

1() **When No Administration is Pending.** A trustee's sale by a mortgagee made under a power of sale is not void but is *voidable* in the event a dependent administration is initiated within the four-year statutory period and the administration seeks to have the sale canceled. Pearce v. Stokes, 155 Tex. 564, 291 S.W.2d 309 (1956).

2() **During The Pendency of A Dependent Administration.** The power of sale under the deed of trust is suspended as long as the administration is pending and a non-judicial foreclosure sale by the mortgagee is *void*. Pearce v. Stokes, 291 S.W.2d at 310-311; Rivera v. Morales, 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

(1) The mortgagee who forecloses against un-administered estate does so at his own risk. Pearce v. Stokes, 291 S.W.2d at 310.

The power of sale was held to be suspended even in a case where a temporary administration had not technically been made permanent. Hury v. Preas, 673 S.W.2d 949 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

(2) The administrator may also "recover the value of the use of the property during the time the mortgagee held the property" if the sale is set aside. American Savings and Loan v. Jones, 482 S.W.2d 62 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1972, writ ref'd n.r.e.).

(3) A contract vendor cannot declare an executory contract of sale forfeited for nonpayment while the estate of

the intestate vendee is pending but must file a claim with the probate court because contract of sale is a money claim. Rivera v. Morales, 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

## **20. Four Years After Date of Death**

A power of sale may be exercised and the purchaser's sale becomes absolute when more than four years have passed from the date of decedent's death and there has been no administration of the estate. Natali v. Witthaus, 135 S.W.2d 969 (Tex. 1940).

## **30. Joint Obligation**

The lien may be foreclosed against the surviving spouse's interest in the property if the debt is a joint and several obligation of both the husband and wife and the security is community property. Albiar v. Arguello, 612 S.W.2d 219 (Tex. Civ. App.—Eastland 1980, no writ).

# **3. Independent Administration**

## **1. Deed of Trust Foreclosure**

Non-judicial foreclosure is effective to pass title where an independent administration of the deceased grantor's estate exists. Pearce v. Stokes, 291 S.W.2d at 310.

## **10. Notice of Foreclosure**

Notice of trustee's sale is given to the independent executor just as it would have been given to the mortgagor. Suit may be brought against the estate through the independent executor to satisfy any deficiency. Fischer v. Britton, 125 Tex. 505, 83 S.W.2d 305 (1935).

## **20. Foreclosure Following Four-Year Lapse**

When a foreclosure sale is made after the expiration of four years from the date of the grantor's death, and no administration was ever initiated on the deceased's estate, such sale is effective to pass good title. Pearce v. Stokes, 291 S.W.2d at 310.

- 1) Careful attention must be paid to make certain that the running of the statute of limitations under CPRC §16.035(a) will not preclude the enforceability of the mortgagee's lien.

### **3-1. Absolute Title After Four Years**

The purchaser's title becomes absolute upon the four-year expiration date if the power of sale under the deed of trust is made within the four years after the grantors' death and no administration is commenced within that four-year period. Pearce v. Stokes, 291 S.W.2d at 310.

### **4-1. Deficiency**

In either a dependent or independent administration a deficiency judgment after foreclosure is precluded.

## **70. Presenting A Secured Claim**

### **1. Procedure**

#### **1. Creditor's Election**

A creditor may file a claim within *six months* after the original grant of letters, and elect to have the claim allowed and approved as a matured, secured claim to be paid in the due course of administration, or fixed as a preferred debt and lien against specific property securing the debt and paid according to the terms of the contract. T.P.C. §306(b). See Texas Commerce Bank National Assn. V. Geary, 938 S.W.2d 205 (Tex. App.—Dallas 1997) *rev'd on other grounds*, Geary v. Texas Commerce Bank, 967 S.W.2d 836 (Tex. 1998).

#### **1-1. Claim Presented After Six Months**

A claim presented after six months from the issuance of letters can only be presented as a preferred debt and lien against the specific property securing the debt and paid under the terms of the contract. T.P.C. §306(b).

### **3. Creditor Election Consequences**

#### **1. No Deficiency Judgment**



The claimant is not entitled to a deficiency judgment when the privilege was lost by failing to timely notify the administrator. See Wyatt v. Morse, 129 Tex. 199, 102 S.W.2d 396 (1937).

#### **1-1. Preferred Debt and Lien**

The claimant can only look to the property's sales proceeds in satisfaction of the indebtedness when choosing preferred debt and lien statutes T.P.C. §306(d)

#### **2-1. Failure To Elect**

The claim shall be given preferred debt and lien status if the claimant fails to make an election within six (6) months from the original grant of letters. T.P.C. §306(b). See Cessna Finance Corp. v. Morrison, 667 S.W.2d 580 (Tex. App.\_Houston [1<sup>st</sup> Dist.] 1984, no writ).

### **4. Creditor Classification Choices**

#### **1. Secured Creditor Priority**

A secured creditor has priority over all creditor's with the exception of first class; i.e. last illness and funeral expenses and second class, i.e. administration expenses, claimants. However, the sale proceeds can not be used to satisfy class one (1) or two (2) claims when sufficient estate assets otherwise exist to pay them.

#### **1-1. Matured Secured Claim - Solvent Estate**

The secured claimant whose claim is treated as a mature, secured claim will be fully paid in the due course of administration if the estate is solvent.

#### **2-1. Preferred Debt and Lien - Insolvent Estate**

The secured claimant should file its claim as a preferred debt and lien and elect the security's value in satisfaction of its claim when insufficient estate assets exist. The sale of the secured asset allows the claimant to be paid up to the amount of the claim from the asset.

### **3-1. Terms of Contract**

Preferred debt and lien election allows the administrator or subsequent distributee to pay according to the terms of the contract securing a loan by bringing the note current and/or paying the installments.

## **5. Handling of the Claim**

### **1. Thirty Days to Approve or Deny**

The administrator has thirty days to approve or deny the claim, in whole or in part, from the date of presentment. T.P.C. §309.

#### **1-1. No Action**

The claim is deemed rejected if no action is taken within thirty days.

#### **2-1. Waiver of Defects**

All defects of form and any objections to insufficiency of exhibits or vouchers are deemed waived if not objected to by the representative within thirty days after the claim is presented. See City of Austin v. Aguilar, 607 S.W.2d 310 (Tex. Civ. App.—Austin 1980, no writ).

### **3-1. Ninety Days to File**

The claimant must bring suit within ninety days from the date of rejection or the claim is barred. T.P.C. §313.

- 1) An unnecessary presentation and rejection of a claim under a vendor's lien against a decedent's estate that was not required to be presented in the first place does not invoke the ninety-day limitations period for filing suit on a rejected claim. T.P.C. §313; See Lusk v. Mintz, 625 S.W.2d 774 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1981, no writ); see Ullrich v. Anderson, 740 S.W.2d 481 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1987, no writ).

### **4-1. Validity of Lien**

The personal representative has the power to pass on the validity of the lien when the claimant elects to file a claim as a preferred debt and lien. Laubhan v. Peoria Life Ins. Co., 102 S.W.2d 399 (Tex. 1937).

## **2. Acceleration Clause**

Presentment of a claim as a mature, secured claim may trigger the acceleration clause of the deed of trust. Woodward & Smith §916.

### **5-1. Payment Options on Preferred Debt and Lien Status**

Presentment of a claim as preferred debt and lien against specific property allows the representative to either:

- 1) pay the claim under the provisions of the contract by bringing the loan current and resume installment payments; or
- 2) distribute the property to the beneficiary who takes the property subject to the terms of the security instrument.

## **6. Satisfaction Of The Claim**

### **1. Representative's Application for Sale**

The representative may make application for the sale of property and secure an order of sale provided the court approves the claim and finds the sale necessary or advisable. T.P.C. §341.

#### **1-1. Report and Confirmation**

A report by the personal representative is made to the court and confirmation is issued by order of the court after the sale is made.

## **7. Sale Of Mortgaged Property**

### **1. Creditor's Application for Sale**

A creditor holding a claim secured by a valid mortgage or other lien, which has been allowed and approved or established by suit may petition the court to sell the property and cite the representative to appear and show cause why it should not be sold. T.P.C. §338.

#### **1-1. Order of Sale**

The application may be granted and an order issued that the property be sold unless it appears to the court that it would be advisable to discharge the lien out of the general estate assets or that it be refinanced. T.P.C. §338.

### **2-1. Payment of Unmatured Portion**

The personal representative must pay the matured portion of the debt and perform all terms of the contract securing the lien if the claim was allowed, approved and fixed as a preferred debt and lien. T.P.C. §306(e).

### **3-1. Default by Representative**

The court, on motion of the claimant, shall require the sale of the property subject to the un-matured part of the debt if the representative defaults; and

- 1) apply the proceeds of the sale to the liquidation of maturities, or
- 2) the claim holder can elect that the property be sold free of the lien and to apply the proceeds to the payment of the whole debt. T.P.C. §306(e).

## **8. Compromise Of The Secured Claim**

### **1. Compromise in Lieu of Sale**

The administrator may apply to the court for the authority to compromise the claim in the absence of an actual sale by either the applicant or the creditor.

### **1-1. Deed-on-Lieu of Foreclosure**

The desired result for the administrator where claimant is a mortgagee is a deed conveying the property back to a mortgagee in liquidation and satisfaction of a claim and cancellation of the note and deed of trust.

### **2-1. Junior Liens**

Real property which is encumbered by junior liens is conveyed back subject to existing junior liens.

## **80. A Creditor's Initiation of Probate Proceeding**

### **1. Application for Letters of Administration**

The creditor can force the opening of an administration of a decedent's estate by filing an application for letters of administration requesting the appointment of an administrator where no administration is pending. T.P.C. §§77, 80. See Humane Society of Austin & Travis County v. Austin National Bank, 531 S.W.2d 574 (Tex. 1975) and Ertel v. O'Brien, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied) (regarding fiduciary standard.)

#### **1-1. Filing Claim**

- 1) The creditor's claim is then submitted by filing an authenticated claim seeking the approval of the administrator.
- 2) The creditor will have to post a bond if appointed by the court. T.P.C. §194

### **2. Proceeding to Determine Heirship**

Any person claiming to be a secured creditor or the owner of the whole or part of a decedent's estate may institute a proceeding to determine heirship. T.P.C. §49(a).

## **90. No Claims Allowed After Partition And Distribution Order**

### **1. No Claims After Order For Partition And Distribution**

No claim for money shall be allowed by the personal representative nor shall suit be instituted after an order of partition and distribution has been made. T.P.C. §318. See Perkins v. Cain's Coffee Co., 466 S.W.2d 801 (Tex. Civ. App.—Corpus Christi 1971, no writ).

### **2. Action Against Heirs, Devisees**

The claimant shall have his action against the heirs, devisees and legatees or creditors of the estate but limited to the value of the property received by them in distributions from the estate. T.P.C. §318. See Perkins v. Cain's Coffee Co., 466 S.W.2d 801 (Tex. App.—Corpus Christi 1971, no writ).

### **3. Liability Of Distributees**

The distributee can be held personally liable for the value of the property received by them if the specific property inherited has been sold. McFarland v. Shaw, 45 S.W.2d 193 (Tex. Comm'n App. 1932, holding approved).

#### **4 . Tolling**

The general statute of limitations is tolled in favor of the creditor by filing an estate claim which is allowed and approved or by instituting suit on a rejected claim. T.P.C. §299. See First National Bank v. Hawn, 392 S.W.2d 377 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) regarding the effect of a suggestion of death.

### **CREDITOR CLAIMS PROCEDURES IN GUARDIANSHIPS**

#### **I. STATUTORY NOTICE REQUIREMENTS**

##### **A. General Notice**

1. Within *one month* after receiving letters, guardians of estates shall send to the comptroller of public accounts by certified or registered mail if the ward remitted or should have remitted taxes administered by the comptroller of public accounts and publish in some newspaper, printed in the county where the letters were issued, if there be one, a notice requiring all persons having a claim against the estate being administered to present the claim within the time prescribed by law. The notice must include the time of issuance of letters held by the representative, the address to which a claim may be presented, and an instruction of the representative's choice that a claim be addressed in care of the representative, in care of the representative's attorney, or in care of "Representative, Estate of \_\_\_\_\_" (naming the estate). T.P.C. §783(a)
2. A copy of the printed notice, with the affidavit of the publisher, duly sworn to and subscribed before a proper officer, to the effect that the notice was published as provided in this chapter for the service of citation or notice by publication, shall be filed in the court in which the cause is pending T.P.C. §783(b)

## **B. Notice to Holders of Recorded Claims**

1. Within *four months* after receiving letters, the guardian of an estate *shall* give notice of the issuance of the letters to each and every person having a claim for money against the estate of a ward if the claim is secured by a deed of trust, mortgage, or vendor's, mechanic's or other contractor's lien on real estate belonging to the estate. T.P.C. §784(a). Within *four months* after receiving letters, the guardian of an estate *shall* give notice of the issuance of the letters to each person having an outstanding claim for money against the estate of a ward if the guardian has actual knowledge of the claim. T.P.C. §784(b). The notice stating the original grant of letter shall be given by mailing the notice by certified mail or registered letter, with return receipt requested, addressed to the record holder of the indebtedness or claim at the last known post office address of the record holder. T.P.C. §784(c).
2. A copy of each notice required by § 784 (a) , with the return receipt and an affidavit of the representative, stating that the notice was mailed as required by law, giving the name of the person to whom the notice was mailed, if not shown on the notice or receipt, shall be filed in the court from which letters were issued. T.P.C. §784(d).
3. The Legislature has now brought the guardianship claim procedure consistent with that involving decedent's estates by adding §784 (e) which provides that in the notice required by §784 (b), the guardian of the estate may expressly state in the notice that the unsecured creditor must present a claim *not later than the 120th day* after the date on which the unsecured creditor receives the notice *or the claim is barred*, if the claim is not barred by the general statutes of limitation. The notice under this subsection must include: (1) the address to which claims may be presented; and (2) an instruction that the claim be filed with the clerk of the court issuing the letters of guardianship. T.P.C. §784(e).

## **C. Effect of Failure to Give Notice**

1. If the notice required by Section 784 of this code has been given by a *former representative*, or by one when several representatives are acting, the notice given by the former representative or co-representative is sufficient and *need not be repeated by any successor or co-representative*. T.P.C. §785(a).

2. If the guardian fails to give the notice required or to cause the notices to be given, *the guardian and the sureties on the bond* of the guardian shall be liable for any damage that any person suffers because of the neglect, *unless it appears that the person had notice otherwise*. T.P.C. §785(b).

## **II. CREDITOR CLAIM PRESENTMENT**

### **A. When and to Whom Can Creditor Present Claim**

1. A claim may be presented *to the guardian* of the estate at *any time when the estate is not closed* and when suit on the claim has not been barred by the general statutes of limitation. A claim of an unsecured creditor for money that is not presented within the time prescribed by the notice of presentment permitted by Section 784(e) of this code is barred. T.P.C. §786(a).
2. A claim against a ward on which a suit is barred by a general statute of limitation applicable to the claim *may not* be allowed by a guardian. If allowed by the guardian and the court is satisfied that limitation has run, the claim *shall be disapproved*. T.P.C. §786(b).
3. A claim may also be presented by depositing the claim, with vouchers and necessary exhibits and affidavit attached to the claim, *with the clerk*. The clerk, on receiving the claim, shall advise the guardian of the estate or the guardian's attorney by letter mailed to the last known address of the guardian of the deposit of the claim. If the guardian fails to act on the claim *within 30 days* after it is filed, the claim is *presumed to be rejected*. Failure of the clerk to give notice as required under this section does not affect the validity of the presentment or the presumption of rejection of the claim because not acted on within the 30-day period. T.P.C. § 795.

### **B. Form In Which Claim Must Be Presented**

1. Except as provided by Section 788 with respect to the payment of an unauthenticated claim by a guardian, a guardian of the estate *may not allow* and the court may not approve a claim for money against the estate, *unless the claim is supported by an affidavit* that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. If the claim is not founded on a written instrument or account, the affidavit must also state the facts on which the claim is founded. A photostatic copy of an exhibit or voucher



necessary to prove a claim under this section may be offered with and attached to the claim instead of the original. T.P.C. §788.

2. The cashier, treasurer, or managing official of a corporation shall make the affidavit required to authenticate a claim of the corporation. When an affidavit is made by an officer of a corporation, or by an executor, administrator, guardian, trustee, assignee, agent, or attorney, it is sufficient to state in the affidavit that the person making the affidavit has made diligent inquiry and examination and that the person believes that the claim is just and that all legal offsets, payments, and credits made known to the person making the affidavit have been allowed. T.P.C. §791.

**C. Guardian Must Make Written Objection to Any Defects Within 30 Days**

Any defect of form or claim of insufficiency of exhibits or vouchers presented *is deemed waived* by the guardian unless *written objection* to the form, exhibit, or voucher is made not later than the *30th day* after the date of presentment of the claim and is filed with the county clerk. T.P.C. §789.

**D. Payment of Unauthenticated Claims**

A guardian may pay an unauthenticated claim against the estate of the guardian's ward that the guardian believes to be just, but the guardian and the sureties on the bond of the guardian shall be liable for the amount of any payment of the claim if the court finds that the claim is not just. T.P.C. §792.

**E. Procedure for Lost or Destroyed Claims**

If evidence of a claim is lost or destroyed, the claimant or a representative of the claimant may make affidavit to the fact of the loss or destruction, stating the amount, date, and nature of the claim and when due, that the claim is just, that all legal offsets, payments, and credits known to the affiant have been allowed, and that the claimant is still the owner of the claim. The claim must be proved by disinterested testimony taken in open court, or by oral or written deposition, before the claim is approved. If the claim is allowed or approved without the affidavit or if the claim is approved without satisfactory proof, the allowance or approval is void. T.P.C. §790.

**F. Presentment of Claims is a Prerequisite for Judgment**

With the exception of a claim for delinquent ad valorem taxes, a judgment may not be rendered in favor of a claimant on any claim for money that has not been legally presented to

the guardian of the estate of the ward and rejected by the guardian or by the court, in whole or in part. T.P.C. § 801.

### **III. CLAIM REVIEW PROCEDURE**

#### **A. Guardian Must Accept or Reject Within 30 Days**

When a duly authenticated claim against a guardianship estate is presented to the guardian or filed with the clerk as provided by this subpart, the guardian shall, not later than the 30th day after the date the claim is presented or filed, endorse or annex to the claim a *memorandum signed by the guardian* stating the time of presentation or filing of the claim and that the guardian *allows or rejects the claim*, or what portion of the claim the guardian allows or rejects. T.P.C. §796.

#### **B. Effect of Failure to Accept or Reject**

The failure of a guardian of an estate to endorse on or annex to a claim presented to the guardian, or the failure of a guardian to allow or reject the claim or portion of the claim within 30 days after the claim was presented constitutes a *rejection* of the claim. If the claim is later established by suit, the costs shall be taxed against the guardian, *individually*, or the guardian may be removed as in other cases of removal on the written complaint of any person interested in the claim, after personal service of citation, hearing, and proof. T.P.C. §797

#### **C. Claim Shall Be Filed with Clerk**

After a claim against a ward's estate has been presented to and allowed by the guardian, either in whole or in part, the claim *shall* be filed with the county clerk of the proper county who shall enter it on the claim docket. T.P.C. § 798.

#### **D. Objections to Claim by Third Party**

*Any person interested* in a ward, at any time *before the court has acted on a claim*, may appear and object in writing to the approval of the claim, or any part of the claim. The parties are entitled to process for witnesses, and the court shall hear proof and render judgment as in ordinary suits. T.P.C. § 799(a). The court shall either approve in whole or in part or reject a claim that has been allowed and entered on the claim docket *for a period of 10 days* and shall at the same time classify the claim. T.P.C. § 799(b)

#### **E. Court has Final Say on Justness of Claim**

Although a claim may be properly authenticated and allowed, if the court is not satisfied that it is just, the

court shall examine the claimant and the guardian under oath and hear other evidence necessary to determine the issue. If after the examination and hearing the court is not convinced that the claim is just, the court shall disapprove the claim. T.P.C. § 799(c).

**F. Court Action on Claim Constitutes Appealable Final Judgment**

When the court has acted on a claim, the court shall endorse on or annex to the claim a written memorandum dated and signed officially that states the exact action taken by the court on the claim, whether the court approved or disapproved the claim or approved in part or rejected in part the claim, and that states the classification of the claim. An order under this subsection has the force and effect of a final judgment. T.P.C. § 799(d). When a claimant or any person interested in a ward is dissatisfied with the action of the court on a claim, the claimant or person interested may appeal the action to the courts of appeals, as from other judgments of the county court in probate matters. T.P.C. § 799(e). **G. Creditor Has 90 Days to Sue on Rejected Claim or Else Claim is Barred**

When a claim or a part of a claim has been rejected by the guardian, the claimant shall institute suit on the claim in the court of original probate jurisdiction in which the guardianship is pending or in any other court of proper jurisdiction not later than the *90th day after the date of the rejection of the claim or the claim is barred*. When a rejected claim is sued on, the endorsement made on or annexed to the claim is taken to be true without further proof, unless denied under oath. When a rejected claim or part of a claim has been established by suit, no execution shall issue but the judgment shall be certified not later than the 30th day after the date of rendition if the judgment is from a court other than the court of original probate jurisdiction, filed in the court in which the cause is pending entered on the claim docket, classified by the court, and handled as if originally allowed and approved in due course of administration. T.P.C. § 800. **H. Costs of Suit With Respect to Claims** All costs incurred in the probate court with respect to claims are taxed as follows:

- (1) if allowed and approved, the guardianship estate shall pay the costs;
- (2) if allowed, but disapproved, the claimant shall pay the costs;
- (3) if rejected, but established by suit, the guardianship estate shall pay the costs;
- (4) if rejected, but not established by suit, the claimant shall pay the costs; or

(5) in suits to establish a claim after rejection in part, if the claimant fails to recover judgment for a greater amount than was allowed or approved, the claimant shall pay all costs. T.P.C. § 802.

**I. Claims May Not be Paid Unless Approved by Court** Except as provided for payment at the risk of a guardian of an unauthenticated claim, a claim for money against the estate of a ward or any part of a claim may not be paid until it has been approved by the court or established by the judgment of a court of competent jurisdiction. T.P.C. § 804. **IV. CLASSIFICATION AND PRIORITY OF PAYMENT**

#### **A. General Classification**

Unlike the provisions regarding decedent's estates, the guardianship provisions do not contain a section similar to Section 322 which sets out a classification of claims, even though Section 799 seems to require it. However, the legislature has given us Section 805 entitled "Order of Payment of Claims" which should suffice.

Section 805(a) provides that the guardian shall pay a claim against the estate of the guardian's ward that has been allowed and approved or established by suit, *as soon as practicable*, in the following order, ( except as provided by Subsection (b) :

(1) expenses for the care, maintenance, and education of the ward or the ward's dependents;

(2) funeral expenses of the ward and expenses of the ward's last illness, if the guardianship is kept open after the death of the ward as provided under this chapter, except that any claim against the estate of a ward that has been allowed and approved or established by suit before the death of the ward shall be paid before the funeral expenses and expenses of the last illness;

(3) expenses of administration; and

(4) other claims against the ward or the ward's estate.

#### **B. If Estate is Insolvent, Administration Expenses Are Paid First**

Section 805(b) provides, however, that if the estate is *insolvent*, the guardian shall give *first priority* to the payment of a claim relating to the *administration* of the guardianship. The guardian shall pay other claims against the ward's estate in the order prescribed by Subsection (a) of this section.

### **C. Procedure When Claim Not Paid**

A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by the applicable statute of limitations and on due proof procure an order for its allowance and payment from the estate. T.P.C. § 805(c)

### **D. Guardian Shall Pay Pro-Rata in the Event of Deficiency**

When there is a deficiency of assets to pay all claims of the *same class*, the claims in the *same class* shall be paid *pro rata*, as directed by the court, and in the order directed. A guardian may not be allowed to pay any claims, whether the estate is solvent or insolvent, except with the *pro rata* amount of the funds of the guardianship estate that have come to hand. T.P.C. § 806.

## **V. METHOD OF HANDLING SECURED CLAIMS IN GUARDIANSHIPS**

### **A. Creditor Must Elect Status**

In addition to the other procedures required generally of creditors, when a *secured* claim against a ward is presented, the claimant *shall* specify in the claim, in addition to all other matters required to be specified in claims:

(1) whether the claim shall be allowed and approved as a *matured secured claim* to be paid in due course of administration, in which event it shall be so paid if allowed and approved;

or (2) whether the claim shall be allowed, approved, and fixed as a *preferred debt and lien* against the *specific property* securing the indebtedness and paid according to the terms of the contract that secured the lien, in which event it shall be so allowed and approved if it is a valid lien; provided, however, the guardian may pay the claim prior to maturity if it is in the best interests of the estate to do so. T.P.C. § 793(a)

If a secured claim is not presented within the time provided by law, it shall be treated as a claim to be paid in accordance with Section 793 (a)(2). T.P.C. § 793(b)

### **B. If a Preferred Debt and Lien, no Further Claim Against Estate Assets Allowed**

When an indebtedness has been allowed and approved under Subsection (a)(2) of this section, no further claim shall be made against other assets of the estate because of the indebtedness, but the claim remains a preferred lien against the property securing the claim, and the property remains security for the debt in any distribution or sale of the property before final maturity and payment of the debt. T.P.C. § 793(c)

### **C. Guardian's Duties With Respect to Preferred Debt and Lien**

If the property that secures a claim allowed, approved, and fixed as a preferred debt and lien is not sold or distributed not later than the 12th month after the date letters of guardianship are granted, the guardian of the estate *shall* promptly pay all maturities that have accrued on the debt according to the terms of the maturities and shall perform all the terms of any contract securing the maturities. If the guardian defaults in the payment or performance, the court, on motion of the claim holder, shall require the sale of the property subject to the unmatured part of the debt and apply the proceeds of the sale to the liquidation of the maturities or, at the option of the claim holder, a motion may be made in a like manner to require the sale of the property free of the lien and to apply the proceeds to the payment of the whole debt. T.P.C. § 793(d)

### **D. Claims Providing for Attorney's Fees**

If the instrument that evidences or supports a claim provides for attorney's fees, the claimant may include as a part of the claim the portion of the fee that the claimant has paid or contracted to pay to an attorney to prepare, present, and collect the claim. T.P.C. § 794

### **VI. LIABILITY FOR NONPAYMENT OF CLAIMS**

If a guardian of an estate fails to pay on demand any money ordered by the court to be paid to any person, except to the state treasury, when there are funds of the guardianship estate available, the person or claimant entitled to the payment, *on affidavit* of the demand and failure to pay, is authorized to have *execution issued against the property* of the guardianship for the amount due, with interest and costs. T.P.C. § 809(a)

On return of the execution not satisfied, or merely on the affidavit of demand and failure to pay, the court may cite the guardian and the sureties on the bond of the guardian to show cause why the guardian or the sureties should not be held liable for the debt, interest, costs, or damages. On return of citation duly served, if good cause to the contrary is not shown, the court shall render judgment against the guardian and sureties that are cited under this subsection in favor of the holder of the claim for the unpaid amount ordered to be paid or established by suit, with interest and costs, and for damages on the amount neglected to be paid, at the rate of five percent per month for each month or fraction of a month that the payment was neglected to be paid after demand was made for payment. The damages may be collected in any court of competent jurisdiction. T.P.C. § 809(b)

